BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTORIA F. COLVIN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,034,026
	)	& 1,038,486
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the October 19, 2009 Award entered by Administrative Law Judge Brad E. Avery. The Workers Compensation Board heard oral argument on January 13, 2010.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the May 5, 2009 report by Dr. Peter V. Bieri.

ISSUES

In the October 19, 2009 Award, ALJ Avery consolidated these claims and determined the date of accident was February 12, 2007, the date respondent was notified in writing of claimant's injury. The ALJ found that claimant did sustain accidental injuries and the series of accidental injuries that claimant sustained arose out of and in the course of her employment with respondent and should be regarded as one series. ALJ Avery determined claimant's average weekly wage was $728.25. Regarding the nature and extent of claimant's disability, the ALJ found claimant sustained a 15 percent whole person

functional impairment to her neck and a 5 percent whole person functional impairment to her low back and that the ultimate whole person functional impairment for these injuries was 19 percent, for which the Judge granted claimant permanent partial disability benefits.

Respondent contends the claimant had one discrete accident on October 27, 2006, not a series of accidents or injuries caused by repetitive use and that notice was not timely. Respondent further contends the ALJ abused his discretion by granting the claimant's motion to withdraw the parties' stipulation as to the average weekly wage.

Claimant contends ALJ Avery's findings should be affirmed in all respects.

The issues before the Board on this appeal are:

1. The date of accident or accidents including whether claimant suffered a single accident or a series of accidents.

2. Whether notice of the accident was timely.

3. Whether the average weekly wage was correctly calculated.

4. Whether the ALJ abused his discretion in granting claimant's motion to withdraw the stipulation as to the average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties do not contest the ALJ's findings that claimant sustained a 15 percent whole person functional impairment to her neck and a 5 percent whole person functional impairment to her back.

The claimant originally alleged two accidents, one being a series to February 12, 2007, and the other occurring on January 16 or 17, 2008. The respondent contends claimant sustained one distinct accident on October 27, 2006, and that notice was not timely and further that no accident occurred on January 16 or 17, 2008. The ALJ found the series of accidents should be regarded as one series with the date of accident being February 12, 2007.

On or about October 27, 2006, the claimant was working in a mail room at the time of the alleged accident involving her neck (Docket No. 1,034,026). Her regular duties

included lifting heavy boxes, pushing hampers of mail and reaching overhead while sorting mail.

After lifting 50-pound boxes of copy paper on or about October 27, 2006, the claimant experienced pain in her neck and left shoulder and numbness in her left arm. The claimant first sought treatment for the neck and shoulder pain from Dr. Jacqueline L. Kenoly, her personal physician. Dr. Kenoly initially was not available and sent claimant to Dr. Scott Teeter's office. Claimant was prescribed medication and referred for physical therapy. Dr. Kenoly ordered MRI studies of claimant's left shoulder and cervical spine. The cervical spine MRI showed disk bulging and hypertrophic changes, most prominent at C6-7. The physical therapy did not help so Dr. Kenoly referred the claimant to a neurologist, Dr. Jonson Huang.

Claimant saw Dr. Huang on February 1, 2007. Claimant testified that during that visit Dr. Huang identified her condition as work related. Dr. Huang referred claimant for further physical therapy and provided restrictions to avoid lifting, pushing hampers and overhead work. After receiving notice on February 12, 2007, respondent accommodated claimant's restrictions by putting her on light duty.

As claimant continued to work and receive treatment for her injuries, her restrictions were modified. Claimant continued to work in the mail room and assumed her regular duties as best she could. Although she was on restricted duty, her work continued to include some repetitive activities including lifting and overhead reaching.

Claimant verbally notified her Human Resources department of her October 27, 2006 injury on February 2, 2007. She provided written notice of the work-related injury on February 12, 2007.

At an August 14, 2007 preliminary hearing, claimant testified that when she last saw Dr. Huang in May 2007, the doctor recommended she see a surgeon. In an August 15, 2007 preliminary hearing Order, the ALJ ordered medical treatment with Dr. Glenn M. Amundson. The doctor ordered cervical epidural steroid injections for the claimant. On January 16, 2008, claimant was asked by respondent to work in the warehouse loading and unloading income tax booklets. This required claimant to stand for long periods of time, which caused pain primarily in her lower back. When claimant saw Dr. Amundson on January 18, 2008, for a follow-up visit after her cervical epidural steroid injections, the doctor recommended neck surgery as physical therapy and the epidural injections failed to resolve the symptoms related to claimant's cervical spine. An anterior cervical discectomy and fusion at C6-7 was performed on February 12, 2008, by Dr. Amundson. Claimant was ordered off work from February 12, 2008, through May 10, 2008, to recuperate from the surgery.

At the request of claimant's attorney, Dr. Daniel D. Zimmerman examined the claimant in January 2009. He testified that claimant continued to injure herself up until the onset of the increased pain on January 16, 2008. Dr. Edward J. Prostic, who examined claimant in September 2009 and testified on behalf of the respondent, indicated the medical reports do not indicate a specific injury from a specific event.

Based on a thorough review of the evidence, the Board concludes the ALJ's Award should be modified.

Claimant alleged she suffered a series of accidents and injuries to her neck. The respondent contends the claimant suffered one discrete accident on October 27, 2006. Further, respondent contends the notice of that accident was not timely. The record does not support respondent's positions.

Claimant's job duties involved a series of repetitive activities – loading, unloading, pushing hampers, and overhead reaching. It was this repetitive activity that caused the claimant's onset of neck and shoulder pain in October 2006. Although on restricted duty, claimant's work duties continued to require repetitive activities of loading, unloading and overhead reaching, which caused her condition to worsen until surgery was necessary. The claimant's injuries occurred as a result of a series of accidents and repetitive use.

To determine the date of the accident and if the claimant's notice was timely provided we must look to K.S.A. 2006 Supp. 44-508(d), which states in pertinent part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

The plain language of the statute states that when an accident occurs due to a series of events or repetitive use and the employee is not taken off work or restricted from performing the work that caused the accident by the authorized physician, the date of the accident is the date written notice is given. Claimant was not taken off work nor restricted

from performing her job duties by an authorized physician until a date subsequent to the claimant providing written notice of her injury. Thus, the date of the accident is February 12, 2007, the date she provided written notice. Notice was timely pursuant to K.S.A. 2006 Supp. 44-508 and K.S.A. 44-520.

Next we turn to the alleged January 16, 2008 accident (Docket No. 1,038,486), which caused claimant increased pain primarily in her lower back. As indicated above, the ALJ found the series of accidents should be regarded as one series. The respondent contends there was no accident on January 16, 2008. The Board does not find sufficient evidence to support the ALJ's finding. Nor does the Board find respondent's argument persuasive.

Before January 16, 2008, claimant's complaints and medical treatment were related to the neck. The accident on January 16, 2008, caused pain primarily to her lower back. The medical reports prior to January 16, 2008, do not mention or discuss a back injury. Nor was any treatment prescribed for the back before that date. The evidence does not support the ALJ's finding that the January 16, 2008 back injury was part of the series of events that commenced around October 2006. The Board finds that an accident occurred on January 16, 2008, and it was a separate and distinct accident to claimant's low back. The back injury is also found to be the result of a series of accidents.

The parties stipulated to the average weekly wage for Docket No. 1,034,026; however, the claimant moved to withdraw that stipulation. In support of the motion, claimant showed, while she was on temporary total disability from February 12, 2008, through May 10, 2008, her KPERS contributions were withheld. Respondent argues the ALJ wrongly granted the motion. K.A.R. 51-3-8(c) and (e) state:

> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.
>
> (e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.

Respondent failed to provide complete and accurate payroll records as required by the above-mentioned regulation. Respondent's failure to comply with the regulation resulted in the stipulated average weekly wage being incorrect. It would be unfair to allow the respondent's failure to disadvantage the claimant. The ALJ's granting of the claimant's motion was proper.

The evidence shows the average weekly wage of the claimant is as follows:

The average weekly wage for the February 12, 2007 accident is $680.80.

While claimant was off work and receiving temporary total disability benefits, the average weekly wage is $728.25.

The average weekly wage for the January 16, 2008 accident is $694.40.

The Board finds that two accidents as a result of a series of events occurred. February 12, 2007, is the date of the accident related to the neck. January 16, 2008, is the date of the accident related to the low back. The ALJ's Award is modified accordingly.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[1] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the October 19, 2009 Award entered by ALJ Avery, as follows:

Docket No. 1,034,026

Victoria F. Colvin is granted compensation from the State of Kansas and its insurance fund for a February 12, 2007 accident and resulting disability. Based upon an average weekly wage of $728.25, Ms. Colvin is entitled to receive 12.71 weeks of temporary total disability benefits at $483 per week, or $6,138.93. Based upon an average weekly wage of $680.80, Ms. Colvin is entitled to receive 62.25 weeks of permanent partial disability benefits at $453.89 per week, or $28,254.65, for a 15 percent permanent partial disability to the neck. The total award is $34,393.58, which is all due and owing less any amounts previously paid.

Docket No. 1,038,486

Victoria F. Colvin is granted compensation from the State of Kansas and its insurance fund for a January 16, 2008 accident and resulting disability. Based upon an average weekly wage of $694.40, Ms. Colvin is entitled to receive 20.75 weeks of

[1] K.S.A. 2008 Supp. 44-555c(k).

permanent partial disability benefits at $462.96 per week, or $9,606.42, for a 5 percent permanent partial disability to the back, making a total award of $9,606.42, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Brad E. Avery, Administrative Law Judge